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Division II
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IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RICHARD G. NEIGHBARGER

Appellant.

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

Cause No. 15-1-03789-9

REPLY BRIEF OF APPELLANT

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I. STATEMENT OF THE CASE

The appellant adopts the statement of the case as set forth in his opening brief.

II. ARGUMENT

A. THE COURT ABUSED ITS DISCRETION IN NOT ALLOWING TESTIMONY FOR DISHONESTY AFTER THE STATE HAD OPENED THE DOOR TO ALLOW FOR THE TESTIMONY.

When a party introduces evidence that may leave the jury with a “false impression,” *United States v. Whitworth*, 856 F.2d 1268, 1285 (9th Cir. 1988), or an “incomplete picture,” *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), of a material issue opens the door for the opponent then to introduce rebuttal evidence on the material issue. *State v Lile*, 188 Wn.2d 766, 796, 398 P.3d 1052 (2017)(Madsen concurring)(citing *United States v. Whitworth*, 856 F.2d 1268, 1285 (9th Cir. 1988); *State v. Lord*, 117 Wn.2d 829, 894, 822 P. 2d 177 (1991)).

As noted by Justice Madsen, the doctrine is focused on getting to the truth of the matter. As a result, the courts have entertained claims that a party has opened the door to the opponent’s rebuttal evidence. For instance, in *United States v. Catillo*, 181 F.3d 1129, 1132 (9th Cir. 1999) the Court held that the defendant’s testimony portraying himself as a “paragon of virtue,” opened the door to impeachment with otherwise inadmissible evidence. And, in *In re Det. Of West*, 171 Wn.2d 383, 400, 256 P.3d 302 (2011) the Washington State Supreme Court held that testimony by a State’s witness regarding defendant’s decision to leave treatment opened the door to evidence of defendant’s rationale for doing so.

See also, State v. Thomas, 150 Wn.2d 821, 859, 93 P.3d 970 (2004) (evaluating whether State opened the door to cross-examination on a prior suspect’s possible motives to murder the victim); *Lord*, 117 Wn.2d at 892 (statement by defendant’s father that defendant was “a good boy” opened the door to cross-examination by the State on otherwise inadmissible details regarding the defendant’s prior crimes); *State v. Gefeller*, 76 Wn.2d 449, 454, 458 P.2d 17 (1969) (prosecutor permitted to inquire of State’s witness, a police detective, about A lie detector test on redirect “because the matter of a lie detector test was first introduced by defen[se counsel] on cross examination” of that detective).

Likewise, the state introduced testimony similar to that introduced evidence in *In re West, supra*, that one of the accusers was a “paragon of virtue”. When this occurred, defense had the constitutional right to rebut that evidence with any evidence that negated that incomplete impression with rebuttal evidence—evidence that the trial court refused to allow before the jury. The failure to do so negated the defendant’s right to a fair trial and this Court should reverse.

B. THE COURT IMPROPERLY ALLOWED LUSTFUL DISPOSITION EVIDENCE AGAINST MR. NEIGHBARGER.

The state appears to argue that a defendant, who has a sexual interest in an adult necessarily has the same sexual interest in a child. State’s Brief, at 16-21. While acknowledging that the court did not conduct the required balancing test, it nevertheless argues that no error occurred.

First, the cases cited by the state for the proposition that post charging conduct is admissible for the purposes of showing lustful disposition are inapposite to the situation here.

State v Russell, 171 Wn.2d 118, 249 P.3d 604 (2011) addresses the failure to give a limiting instruction when neither party requested it. That is not the issue in this appeal.

Secondly, *State v. Crowder*, 119 Wn. 450, 205 P. 850 (1922) addressed a situation where the subsequent acts of carnal knowledge occurred within two months of the charged offenses in a continuous unbroken sequence. The situation here is much different with the evidence of subsequent alleged lustful disposition occurring years later and after the accuser had turned the age of majority.

No case has held that lustful disposition towards an adult is equivalent to lustful disposition towards a child. It was error for the court to admit the evidence. Indeed, the whole point of admitting the evidence is because it makes it more probable that the defendant committed the offense charged. *State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991). Lustful disposition towards an adult has no bearing on whether an accused is guilty of child molestation/rape.

III. CONCLUSION

Based on the foregoing and the briefs previously filed, Mr. Neighbarger requests that the Court reverse his convictions and remand the case for further proceedings.

DATED this 8th day of February, 2018.

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CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of this reply brief to be served on the following in the manner indicated below:

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